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BEFORE THE ARIZONA CORPORATION COMMISSION

AZ CORP COMMISSION
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IN THE MATTER OF THE COMPLAINT OF)
 THE BUREAU OF INDIAN AFFAIRS,)
 UNITED STATES OF AMERICA,)
 AGAINST MOHAVE ELECTRIC)
 COOPERATIVE, INC. AS TO SERVICES)
 TO THE HAVVASUPAI AND)
 HUALAPAI INDIAN RESERVATIONS)

DOCKET NO. E-01750A-05-0579

BUREAU OF INDIAN AFFAIRS
 OPPOSITION TO MOHAVE
 ELECTRIC'S MOTION TO
 DISMISS

Mohave Electric Cooperative, Inc. ("Mohave" or "MEC") contends that the Arizona Corporation Commission ("Commission") lacks jurisdiction over the subject matter of the instant dispute. *See* Mohave Electric Cooperative Inc.'s Answer and Motion To Dismiss ("MEC Motion And Answer") at 15, line 3. MEC contends: (a) the Commission lacks authority over Indian lands (*see id.* at 15 – 20); (b) the Havasupai and Hualapai Indian Tribes are indispensable parties that must be joined (*see id.* at 21 – 22); (c) the Commission is not empowered to hear contract disputes (*see id.* at 15 – 20, 22 – 24); and (d) there is no contract between the parties as a matter of law for the Commission to enforce (*see id.* at 25 – 29). As demonstrated below, MEC's arguments are without merit and its motion should be denied.

I. OVERVIEW OF RELEVANT FACTS

MEC is an Arizona public service corporation regulated by the Commission. MEC Motion and Answer at 27, lines 17 – 19. MEC admits that a portion of the electrical power line involved in this case (the "Power Line") is within MEC's certificated area. *See* Mohave Electric Cooperative Inc.'s Statement of Facts ("MEC Statement of Facts") at 1, lines 19 – 20 ("Practically all (except a half mile) of the electrical power line is outside Mohave's certificated area."). In the 1982 contract between MEC and the BIA (the "Contract"), MEC "agree[d] . . . to supply electric energy to serve existing and future residential and commercial installations on the Hualapai and Havasupai Indian Reservations located north of Route 66 on and adjacent to the Supai Road, Coconino County, Arizona." Complaint, Ex. 1 to the Complaint, at Addendum 1, p. 1, 1st para. The Havasupai and the

1 Hualapai Tribes gave MEC rights of way across their reservations for thirty years so they could be
2 provided with electricity. *See id.* at Ex. 2, pp. 10 – 12. MEC admits that, in addition to serving the
3 BIA, it has served several entities located within the Hualapai Indian Reservation with electricity and
4 electrical services from MEC's Power Line. MEC Motion and Answer at 41, line 19 ("Mohave . . .
5 admits that it served the parties listed in Complainant's Exhibit 13 . . .")¹ MEC admits that it "has
6 provided services directly to facilities owned and operated by the [Havasupai and Hualapai] Tribal
7 Councils" (although it alleges it did so as an agent of the BIA). *Id.* at 22, lines 6 – 7. MEC claims
8 that the area for which BIA seeks electrical service is within the area certified for service by the
9 Commission. *See id.* at 38, lines 13 – 16 ("[u]pon information and belief, the area for which BIA
10 seeks service in the Complaint, according to the map of ACC, is certified to UNS or APS"); *see also*,
11 *id.* at 42, lines 13 – 15. MEC admits that all factual allegations made in the Complaint must be taken
12 as true for purposes of deciding MEC's motion to dismiss. *See* Motion and Answer at p. 15, line 20,
13 - p.21, line 1 and fn. 6.²

15 II. STATUTORY AND REGULATORY FRAMEWORK

16 A. The Power Line is part of MEC's service territory

17 The area through which MEC constructed the Power Line and the area in which MEC agreed
18 to provide electricity through the Power Line after it entered into the 1982 Contract and initiated
19 service is part of MEC's service territory. *See* A.R.S. § 40-201.22:

20 22. "Service territory" means the geographic area in which a public power entity
21 or public service corporation owns, operates, controls or maintains electric
22 distribution facilities or natural gas distribution facilities and *that additional*

23 ¹ Some of the entities MEC once served and abandoned include: the Diamond A Ranch, the
24 Hualapai Hunters Building Youth Camp, the Hualapai lake circulation pump at its youth camp pond,
several Hualapai water wells, and a cabin on Nelson Road. *See* Complaint at Ex. 13.

25 ² MEC's Motion and Answer are replete with unsupported statements and arguments of
26 counsel. *See, e.g., id.* at 1 - 6; 10 – 12; 20, lines 6 -7, etc. "[A]rguments and statements of counsel []
27 are not evidence," *Barcamerica Int'l USA Trust v. Tyfield Imps., Inc.*, 289 F.3d 589, 593 n.4 (9th Cir.
28 2002), and are not available to MEC to support its motion to dismiss.

1 *area in which the public power entity or public service corporation has*
2 *agreed to extend electric distribution facilities or natural gas distribution*
3 *facilities, whether established by a certificate of convenience and necessity, by*
 official action by a public power entity or *by contract or agreement.* Emphasis
 added).

4
5 A Commission certificate of convenience and necessity ("CC&N") identifying the subject territory as
6 MEC's service territory, therefore, is unnecessary. *See id.*; A.R.S. § 40-281:

7 A. A public service corporation, other than a railroad, shall not begin construction of a street
8 railroad, a line, plant, service or system, or any extension thereof, without first having
 obtained from the commission a certificate of public convenience and necessity.

9 B. This section shall *not require such corporation to secure a certificate or an extension*
10 *within a city, county or town within which it has lawfully commenced operations, or for an*
11 *extension into territory either within or without a city, county or town, contiguous to its . . .*
12 *plant or system, and not served by a public service corporation of like character, or for an*
13 extension within or to territory already served by it, necessary in the ordinary course of its
14 business. If a public service corporation, in constructing or extending its line, plant or
15 system, interferes or is about to interfere with the operation of the line, plant or system of any
16 other public service corporation already constructed, the commission, on complaint of the
17 corporation claiming to be injuriously affected, may, after hearing, make an order and
18 prescribe terms and conditions for the location of lines, plants or systems affected as it deems
19 just and reasonable. (Emphasis added).

20 **B. The Commission has jurisdiction – statutory framework**

21 Several Arizona statutes (and Commission regulations) establish the Commission's
22 jurisdiction over MEC and its authority to find and to declare that MEC is obligated to take the
23 actions identified on pp. 14 – 16 of BIA's Complaint. The primary relevant statutes are set out
24 serially below. Additional statutory provisions and the Commission's regulations are identified in
25 the discussion that follows.

26 **1. A.R.S. § 40-202 provides in pertinent part:**

27 A. The [Corporation] commission may supervise and regulate
28 every public service corporation in the state and do all things, whether
 specifically designated in such title or in addition thereto, necessary and
 convenient in the exercise if such power and jurisdiction

 * * *

 C. In supervising and regulating public service corporations, the
 commission's authority is confirmed to:

1. Protect the public against deceptive, unfair and abusive business practices

* * *

L. *A public service corporation shall comply with every order, decision, rule or regulation made by the commission in any matter relating to or affecting its business as a public service corporation and shall do everything necessary to secure compliance with and observance of every order, decision, rule or regulation.*

* * *

P. Failure to comply with the rules and procedures adopted pursuant to subsections B and C of this section is an unlawful business practice pursuant to § 44-1522. (Emphasis added).

2.. **A.R.S. § 40-321 provides:**

A. When the commission finds that the equipment, appliances, facilities or service of any public service corporation, or the methods of manufacture, distribution, transmission, storage or supply employed by it are unjust, unreasonable, unsafe, improper, inadequate or insufficient, the commission shall determine what is just, reasonable, safe, proper, adequate or sufficient, and shall enforce its determination by order or regulation.

B. *The commission shall prescribe regulations for the performance of any service or the furnishing of any commodity and upon proper demand and tender of rates, the public service corporation shall furnish the commodity or render the service within the time and upon the conditions prescribed. (Emphasis added).*

3. **A.R.S. § 40-361(B) provides in part:**

Every public service corporation shall furnish and maintain such service, equipment and facilities as will promote the safety, health, comfort and convenience of its patrons, employees and the public, and as will be in all respects adequate, efficient and reasonable.

4.. **A.R.S. § 40-285(A) provides in part:**

A public service corporation shall not sell, lease, assign, mortgage or otherwise dispose of or encumber the whole or any part of its railroad, line, plant, or system necessary or useful in the performance of its duties to the public, or any franchise or permit or any right thereunder, nor shall such corporation merge such system or any part thereof with any other public service corporation without first having secured from the commission an order authorizing it so to do. Every such disposition, encumbrance

1 or merger made other than in accordance with the order of the
2 commission authorizing it is void. (Emphasis added).

3 **5. A.R.S. § 30-806 provides in pertinent part:**

4 I. A public power entity that has a service territory in this state
5 through certificates of convenience and necessity, resolutions of
6 public power entities or contracts or agreements among utilities
7 shall act as the supplier of last resort for electric generation service
8 for every retail electric customer within its service territory whose
9 annual usage is one hundred thousand kilowatt hours or less if
10 other electricity suppliers are unwilling or are unable to supply
11 electric generation service and whose electric generation service
12 has been discontinued through no fault of the retail electric
13 customer. Public power entities that provide electric
14 distribution services are entitled to recover just and reasonable
15 costs for supplying electric generation service under this
16 subsection through a distribution charge on retail customers whose
17 annual usage is one hundred thousand kilowatt hours or less.
18 Public power entities and the commission shall coordinate their
19 respective rules and procedures to provide statewide uniformity.

20 **C. The Commission has jurisdiction – regulatory framework**

21 Arizona statutes provide the Commission with the authority to impose jurisdiction over MEC
22 and to grant the BIA the relief it seeks in the instant controversy. *See Corporation Commission v.*
23 *Pacific Greyhound Lines*, 54 Ariz. 159, 176 -77, 94 P.2d 443, 450 (1939):

24 [T]he paramount power to make all rules and regulations governing public service
25 corporations, not expressly given to the [Corporation] commission by some provision
26 of the [Arizona] Constitution, rests in the legislature, and it may, therefore, exercise
27 such power directly or delegate them to the commission upon such terms and
28 limitations as it thinks proper.

29 The Arizona legislature provided the Commission with the authority to resolve this case. *See* A.R.S. §
30 40-202, *supra* and A.R.S. § 40-321, *supra*. The Commission, in turn, has promulgated regulations
31 governing MEC's conduct in the instant case. Those regulations are set out in the Arizona
32 Administrative Code ("A.A.C.") Title 14, Ch. 2. MEC had to comply with those regulations before
33 unilaterally transferring title to the Power Line. *See* A.A.C. 14-2-202(B) which provides:

34 **B. Application for discontinuance or abandonment of utility service**

35 1. Any utility proposing to discontinue or abandon utility service currently in use by the
36 public shall prior to such action obtain authority therefor from the Commission.

2. The utility shall include in the application, studies of past, present and prospective customer use of the subject service, plant, or facility as is necessary to support the application.....

The BIA has used the electricity MEC provides through the Power Line to perform governmental functions in the Havasupai Village. *See* Complaint at 4, para. 11 – p. 5, line 1; *see also, id.* at p. 14, lines 1 – 3. The BIA and others served by MEC’s Power Line are MEC’s retail electric customers. *See e.g.,* A.R.S. § 40-201.21 (“[r]etail electric customer’ means a person who purchases electricity for that person’s own use, including use in that person’s trade or business, and not for resale, redistribution or retransmission”). MEC is an electrical distribution utility. *See* A.R.S. § 40-201.8 (“[e]lectrical distribution utility’ means a public service corporation or public power entity that operates, controls or maintains electric distribution facilities.”). MEC operates electrical distribution facilities. *See* A.R.S. § 40-201.6 (“[e]lectrical distribution facilities’ means all property used in connection with the distribution of electricity from an electrical plant to retail electric customers except electric transmission facilities.”).³ MEC is an electricity supplier. *See* A.R.S. § 40-201.14 (“‘Electricity supplier’ means a person, whether acting in a principal, agent or other capacity, that is a public service corporation that offers to sell electricity to a retail customer in this state.”). MEC’s point of delivery of electrical energy

³ MEC attempts to characterize its Power Line as a “transmission line,” *see e.g.,* MEC Motion and Answer at 3, lines 6, 19 and 20, in an apparent attempt to claim that it does not operate “electric distribution facilities” (*see* A.R.S. § 40-201.6) or that MEC’s Power Line is not a part of its “electrical distribution facilities,” to except itself out of the definition of an “electric distribution utility,” (*see* A.R.S. § 40-201.8), or to contend that MEC’s Power Line is not a part of its “electrical distribution utility” works, in an attempt to avoid its responsibilities. MEC fails because **transmission** is defined in the context of “[e]lectrical transmission facilities” (A.R.S. § 40-201.11) and “[e]lectrical transmission service” (A.R.S. § 40-201.12) to mean all property or service “so classified by the federal energy regulatory commission or, to the extent permitted by law, so classified by the Arizona corporation commission.” However, the Federal Power Act, 16 U.S.C. § 824, under which the Federal Energy Regulatory Commission operates, deals only with electrical transmission in interstate commerce, not present here. *See also, New York v. Federal Energy Regulatory Commission*, 535 U.S. 1 (2002). The BIA’s reading of the Commission’s regulations applicable in the instant case similarly does not appear to establish a classification of “electrical transmission facilities” or “electrical transmission service” that would except either MEC or its Power Line out of MEC’s responsibilities in this case. MEC constructed the Power Line pursuant to the authority of A.R.S. § 40-281(B). Having adopted the territory at issue in this case as its service territory, MEC is precluded from disposing of the Power Line that extends from Mohave’s Nelson substation to the line side of the Long Mesa Power Transformer without first having secured from the Commission an order authorizing it to do so. *See* A.R.S. § 40-285(A).

1 to the BIA is at the Long Mesa Transformer where Mohave's Power Line connects with the BIA's line.
2 *See, e.g., A.A.C. 14-2-201.31* ("Point of delivery.' The point where facilities owned, leased, or under
3 license by a customer connects to the utility's facilities.") MEC's Power Line (all the way from MEC's
4 Nelson Substation to the Long Mesa Transformer located at the rim of the Grand Canyon) is within
5 Mohave's service territory. *See A.R.S. 40-201.22., supra.* Mohave is required to maintain its current
6 service territory, including the area where the Power Line is located:

7 B. It is the public policy of this state that a competitive market shall exist in the sale of electric
8 generation service. In order to transition to competition for electric generation service, the
commission's authority is confirmed to:

9 * * *

10 3. Maintain the current service territories of public service corporations and prohibit a public
11 service corporation from providing electric distribution service in the service territories of
other electric distribution utilities in this state.

12 A.R.S. § 40-202(B)(3). Mohave must measure the electricity it sells, and is not permitted to estimate
13 charges to its other contractors and charge the costs attributable to others to the BIA. *See, e.g.,*
14 A.A.C. 14-2-209(B)(1):

15 B. Measuring of service

16 1. All energy sold to customers and all energy consumed by the utility, except that
17 sold according to fixed charge schedules, shall be measured by commercially
18 acceptable measuring devices, except where it is impractical to install meters, such as
street lighting or security lighting, or where otherwise authorized by the Commission.

19 And, Mohave is required to (1) provide electricity and electrical distribution service to the BIA at the
20 line side of the Long Mesa Transformer point of delivery and (2) maintain a meter on its electrical
21 power line at the line side of the Long Mesa Transformer to measure the electricity Mohave delivers,
22 through the Power Line, to the BIA. *See, e.g., A.A.C. 14-2-208(A)(2):*

23 A. Utility responsibility

24 1. Each utility shall be responsible for the safe transmission and distribution of
electricity until it passes the point of delivery to the customer.

25 2. The entity having control of the meter shall be responsible for maintaining in safe
26 operating condition all meters, equipment, and fixtures installed on the customer's
premises by the entity for the purposes of delivering electric service to the customer.

1 Mohave is not permitted to use estimating procedures, not previously approved by the Commission,
2 to bill the BIA for electricity usage. *See* A.A.C. 14-2-210(A)(5)(a):

3 R14-2-210. Billing and Collection

4 * * *

5 5. A utility or billing entity may not render a bill based on estimated usage if:

6 a. The estimating procedures employed by the utility or billing entity have not been
7 approved by the Commission.

8 Based on the foregoing, the Commission possesses the statutory and regulatory authority to regulate
9 MEC's actions and activities that are in dispute here and possesses jurisdiction to take the actions set
10 out in pp. 14 – 16 of BIA's Complaint.

11 **III. THE ARIZONA CORPORATION COMMISSION HAS JURISDICTION TO GRANT
12 THE RELIEF THE BUREAU OF INDIAN AFFAIRS SEEKS**

13 **A. The Delivery Of Services To Tribal Land Does Not Affect The
14 Commission's Jurisdiction In This Case**

15 The Havasupai Tribe and the Hualapai Tribe passed tribal resolutions giving MEC easements
16 for rights-of-way across their lands for MEC's Power Line in order to have access to power and electrical
17 services from MEC. *See* Complaint at Ex. 2, pp. 10 – 12. Mohave admits that the BIA granted MEC
18 easements across the Havasupai and Hualapai Indian Reservations for the Power Line. *Compare*
19 Complaint at 7, para. 15, *with* MEC Motion and Answer at 41, para. 13. *See also*, MEC Motion and
20 Answer at 16 at lines 6 – 7 (“[t]he Tribes granted easements for use of these rights-of-way to Mohave
21 for a 30 year period”). The Complaint alleges (and assumed as true for purposes of MEC's motion to
22 dismiss) that MEC has provided, through MEC's electrical line that crosses the Havasupai and Hualapai
23 Indian reservations, electricity and electrical service to the BIA, the Indian Health Service, and to the
24 Havasupai Tribe and its members and the Hualapai Tribe and its members. MEC admits that it has and
25 continues to provide these services, but asserts that it has provided them to the BIA for consumption by

1 the Tribes and their members.⁴ Compare the Complaint at 2, para. 6, with MEC Motion and Answer
2 at 38, lines 4 – 22. But see, *id.* at 18, lines 1 – 2 where MEC admits that “[t]he Transmission Line
3 provides electric service to members of the Tribes.” The Complaint alleges, *see id.* at 9 – 10, para. 19,
4 that MEC maintained its metering equipment at the Long Mesa point of interconnection until at least
5 1996. Despite MEC’s denial, *see* MEC Motion and Answer at 42, para. 17, MEC’s June 6, 1996, letter
6 to the BIA, *see* Complaint at Ex. 8, p.1, last 3 lines, shows BIA’s allegation to be accurate.

7 MEC contractually agreed to this Commission’s jurisdiction. Several provisions of the 1982
8 Contract between MEC and the BIA recognized the Commission’s jurisdiction over matters such as
9 those involved here. The Contract provides:

10 3. PUBLIC REGULATION AND CHANGE OF RATES

11 (a) *Electricity furnished under this contract shall be subject to regulation in the manner and to*
12 *the extent prescribed by any Federal, State, or local regulatory commission having jurisdiction*
over the supply of electricity to the Contractor’s customers generally. (Emphasis added).

13 See Complaint at Ex. 1, Technical Provisions, para. 3. Moreover, although the Contract provides that
14 a contracting officer resolve some disputes between MEC and the BIA, MEC contractually consented
15 to the regulatory jurisdiction of this Commission:

16 (c) *The provisions of (a) [dealing with disputes resolved by a contracting officer] above shall*
17 *not apply to disputes that are subject to the jurisdiction of a Federal, State, or other appropriate*
18 *regulatory authority. The provisions of (a) above shall also be subject to the requirements of*
the law with respect to the rendering of utility services and the collection of regulated rates.
(Emphasis added).

19 See *id.* at Ex. 1, Technical Provisions, at clause “9. Disputes.” In yet another Contract provision MEC
20 consented to this Commission’s jurisdiction:

21 REGULATORY AUTHORITY

22 *The electrical services furnished under this Contract shall be subject to regulation in the manner*
23 *and to the extent prescribed by any federal, state or local regulatory commission having*

24
25 ⁴ MEC concedes that it “permitted twelve residential and commercial installations on the
26 Hualapai and Havasupai Indian reservations to interconnect” with the Power Line (Motion and Answer
27 at 8, lines 21 – 22, footnote omitted), but contends that it permitted these connections “under the
28 authority to act as BIA’s agent.” *Id.* at line 20. MEC has provided no evidence of this alleged agency
designation by BIA to MEC. No such agency relationship exists.

1 *jurisdiction over the supply of electric services to Mohave's customers generally.* (Emphasis
2 added).

3 *See id.* at "Addendum No. 1 To GSA Contract No. GS-00S-67021" at 10. Despite the facts set out
4 above, and despite the fact that under the Contract MEC agreed at least three times that the State of
5 Arizona and the Commission had jurisdiction, MEC now contends that "[t]he Commission, therefore,
6 has no authority to regulate Mohave's activities on the Indian lands, particularly since it is the sovereign
7 territory of two independent nations and since the Commission never granted or extended Mohave's
8 right through its CC&N, to do so." MEC Motion and Answer at 20, lines 20 – 24. MEC's contention
9 fails because it contractually consented to this Commission's jurisdiction.

10 MEC's jurisdictional claim based on the Indian lands defense is without merit. The Commission
11 has jurisdiction over MEC and that is all that is required for the Commission to order MEC to perform
12 the actions the BIA believes are required by applicable law and regulation. *See*, A.R.S. §§ 40-202; 40-
13 321; 40-321; 40- 361; 40-285; 30-806, *supra*, and the Commission's regulations, *supra*, noted above.
14 *See also*, *Cheyenne River Sioux Tribe, et al. v. Public Utility Commission of South Dakota, et al.*, 595
15 N.W.2d 604, 609 (S.D. 1999) ("[c]learly this extensive congressional and legislative authority authorizes
16 the [South Dakota] PUC to regulate the activities of US WEST and its sales of telephone exchanges,
17 whether on or off the reservation."); *Chase v. McMasters*, 573 F.2d 1011, 1019 (8th Cir. 1978) (city
18 wrongfully refused to connect water and sewer lines because property sought to be served was Indian
19 land). Accordingly, MEC has no legal ground to contend that the Commission does not have jurisdiction
20 over the claims alleged in BIA's Complaint. *Accord*, *Cheyenne River Sioux Tribe, et al. v. Public Utility*
21 *Commission of South Dakota, et al., supra*.

22 Moreover, it is disingenuous for MEC to use the tribal land status in an attempt to deny the
23 Tribes and their members electrical service. MEC must provide tribal members living on reservations
24 with the same benefits and services provided to non-Indians living outside of the reservation. MEC is
25 trying to assert tribal sovereignty to avoid living up to its obligations to tribal members, but Arizona law
26 prevents such tactics and unequal treatment. As the Arizona Supreme Court has explained, tribal
27 members are entitled to receive all the protections of Arizona law that are afforded to all other citizens.
28

1 *State v. Zaman*, 190 Ariz. 208, 946 P.2d 459 (1997). Tribal sovereignty protects tribes and their
2 interests, but there is no tribal interest in allowing a non-Indian (MEC) to escape its legal obligations
3 owed to tribal members or entities. Similarly, non-Indian businesses like MEC cannot assert the
4 protections of tribal sovereign immunity unless that defense is raised by the tribe itself. *Smith Plumbing*
5 *Co. v. Aetna Casualty & Surety Co.*, 149 Ariz. 524, 720 P.2d 499 (1986). The tribes (and the BIA) are
6 entitled to the protections this Commission affords all other citizens of this State.

7 **B. The Tribes Are Not Indispensable Parties**

8 MEC claims that the Havasupai and Hualapai Indian Tribes are indispensable parties in this case.
9 The only basis MEC offers for this allegation is that “[t]he Tribes’ rights – both to receive electric
10 service and to assert their own sovereignty – are clearly implicated by this lawsuit and to rule without
11 joining the tribes would be unjust.” It is indeed strange that MEC speculates about the tribes’
12 sovereignty in an effort to deny MEC’s responsibility to provide services to the tribes. In any event,
13 MEC’s indispensability argument is without merit. As the Ninth Circuit Court of Appeals explained:
14 “Speculation about the occurrence of a future event ordinarily does not render all parties potentially
15 affected by that future event necessary or indispensable parties under Rule 19.” *McLaughlin v.*
16 *International Assoc. of Machinists & Aerospace Workers*, 847 F.2d 620, 621 (9th Cir. 1988) (citations
17 omitted). And, MEC has no standing to raise the Tribes’ sovereignty, or the alleged absence of
18 indispensable parties, as a jurisdictional defense. That claim resides with the tribes. *See Dawavendewa*
19 *v. Salt River Project Agric. Improvement & Power Dist.*, 276 F.3d 1150, 155 (9th Cir. 2002):

20 an absent party need merely “claim” a legally protected interest in the suit because just
21 adjudication of claims requires that courts protect a party’s right to be heard and to participate
22 in adjudication of a claimed interest, even if the dispute is ultimately resolved to the detriment
23 of that party. *Shermoen*, 982 F.2d at 1317.

24 This case is not about tribal sovereignty. The Havasupai and the Hualapai Tribes gave MEC rights of
25 way across their reservations for thirty years so they could receive electricity from MEC. This case is
26 about MEC’s obligations to provide electrical service in its service territory. Indispensability of the
27 Tribes is not an issue.
28

1 Finally, the Complaint in this case was brought by the BIA, an executive agency of the United
2 States of America. Tribes are not indispensable parties in actions brought by the United States to protect
3 tribal interests. *See Nevada v. United States*, 463 U.S. 110, 135 (1983):

4 We also hold that the Tribe, whose interests were represented in Orr Ditch by the United States,
5 can be bound by the Orr Ditch decree. This Court left little room for an argument to the contrary
6 in *Heckman v. United States*, 224 U.S. 413 (1912), where it plainly said that "it could not,
7 consistently with any principle, be tolerated that, after the United States on behalf of its wards
8 had invoked the jurisdiction of its courts . . . these wards should themselves be permitted to
9 relitigate the question." *Id.*, at 446. See also Restatement (Second) of Judgments § 41(1) (d)
(1982). We reaffirm that principle now.

10 *And see, Heckman v. United States*, 224 U.S. 413, 434 (1911):

11 When the United States instituted this suit, it undertook to represent, and did represent, the
12 Indian grantors whose conveyances it sought to cancel. It was not necessary to make these
13 grantors parties, for the Government was in court on their behalf. Their presence as parties could
14 not add to, or detract from, the effect of the proceedings to determine the violation of the
15 restrictions and the consequent invalidity of the conveyances. As by the act of Congress they
16 were precluded from alienating their lands, they were likewise precluded from taking any
17 position in the legal proceedings instituted by the Government to enforce the restrictions which
18 would render such proceedings ineffectual or give support to the prohibited acts. The cause could
19 not be dismissed upon their consent; they could not compromise it; nor could they assume any
20 attitude with respect to their interest which would derogate from its complete representation by
21 the United States. This is involved necessarily in the conclusion that the United States is entitled
22 to sue, and in the nature and purpose of the suit.

23 The case relied upon by MEC, *Niagara v. Anderson*, 258 A.D.2d 958, 685 N.Y.S.2d 502
24 (Sup.Ct.N.Y. App. 1999), is inapposite. In that case, the plaintiff power company had been providing
25 electrical service to a resident of an Indian reservation pursuant to a franchise agreement. The BIA
26 declared the agreement void. *Niagara*, 258 A.D.2d at 958. The Indian Nation ("Nation") gave the
27 power company permission to provide service only with the consent of the Nation. The power company
28 attempted to act under the Nation's consent but was frustrated by persons who had not been able to
obtain electrical service to their homes on the reservation. The power company sued persons obstructing
its attempts. The court ruled that the Nation was an indispensable party to the suit because it involved
a determination of the rights and powers of the Nation to consent to electric service on the reservation.
Niagara, 258 A.D. at 959. As demonstrated by the facts, *Niagara* has no applicability where the Federal

1 government brings a claim and represents the interests of a tribe. *See Nevada v. United States, supra*;
2 *Heckman v. United States, supra*.⁵

3 **C. This Is Primarily A Regulatory Case**

4 MEC asserts that "[b]ecause BIA's claims sound in contract, the Commission lacks jurisdiction
5 over the BIA's Complaint." *See* MEC Motion and Answer at 22 – 24. While the 1982 Contract is
6 implicated in this matter, as demonstrated below, this is primarily a regulatory case.

7 In *Qwest Corp. v. Kelly*, 204 Ariz. 25, 59 P.3d 789, 793 – 94 (App. 2002), the Arizona Court of
8 Appeals described the history and function of the Commission as follows:

9 [O]ur supreme court noted in *State ex rel. Woods* that "the framers . . . followed the newest
10 western states in providing a constitutional basis for popular control of corporate regulation by
11 creating an elected commission with broad powers." 171 Ariz. at 291, 830 P.2d at 812. The court
12 recognized that, based on the history of its adoption, the framers intended "to provide both
13 effective regulation of public service corporations and consumer protection against overreaching
14 by those corporations." *Id.* at 290, 830 P.2d at 811. As the court further noted, "the Commission
15 has judicial, executive, and legislative powers. . . . The Commission exercises its executive,
16 administrative function in adopting rules and regulations, its judicial jurisdiction in adjudicating
17 grievances, and its legislative power in ratemaking." *Id.* at 291, 830 P.2d at 812.

18 The Commission has primary jurisdiction in this case. *See In Life Teen, Inc. v. Yavapai County*,
19 No. CIV 01-1490 PCT RCB, (D. Ariz. 2003), 2003 U.S. Dist. LEXIS 24363, * judgment entered by, in
20 part, request denied, 2003 U.S. Dist. LEXIS 24364 (D. Ariz. 2003), where the United States District
21 Court for the District of Arizona explained the doctrine of primary jurisdiction as applied to the
22 adjudicative role of the Commission:

23 Primary jurisdiction is a judicially created doctrine meant to "effectuate the efficient handling
24 of cases in specialized areas" of law governed by administrative agencies. *Campbell*, 586 P.2d
25 at 991. "The doctrine of primary jurisdiction determines whether the court or the agency should
26 make the initial decision in a particular case." *Id.* at 990. When the subject matter of a case is
27 "peculiarly within the agency's specialized field" then the court should refrain from exercising
28 jurisdiction over the case, "otherwise parties who are subject to the agency's continuous
regulation may become the victims of uncoordinated and conflicting requirements." *Id.* at 991.
In certain instances a court's decision to refrain in favor of an administrative agency is not
discretionary; when exclusive, plenary power over an area of law is invested in a particular
agency then the court has no jurisdiction to act. *See Qwest Corp. v. Kelly*, 204 Ariz. 25, 59 P.3d
789, 2002 WL 31655338, P 12 (Ariz. Ct. App., Oct. 24, 2002); *Morris v. Arizona Corp. Comm'n*,
24 Ariz. App. 454, 539 P.2d 928, 931 (Ct. App. 1975).

26 ⁵ While the tribes are not indispensable parties, if the Commission feels otherwise, the BIA
27 requests that time be permitted to allow them to intervene.

1 *See also, Qwest Corp. v. Kelly, supra*, 59 P.3d at 796 (the question of primary jurisdiction turns on
2 whether plaintiffs seek relief to establish broad public doctrines, or rights to service or levels of service,
3 or are relatively simple tort and contract issues revolving around a central inquiry of whether, under
4 traditional judicial principles, the defendant has committed a civil wrong against the complainant).

5 In the instant case, the BIA seeks relief under Arizona statutes over which the Commission has
6 primary jurisdiction and under the Commission's regulations interpreting and applying those statutes.
7 *See the Complaint at pp. 14 – 16.* Among others, the BIA seeks to prohibit MEC from abandoning the
8 Power Line and abandoning its customers. The BIA also is seeking to establish the broad public doctrine
9 of the duty, under the statutes and regulations over which the Commission has authority, of Arizona
10 public service corporations to provide services to Indians on Indian reservations in Arizona where a
11 public service corporation established parts of Indian reservations as its service territory and where the
12 public service corporation served the Indians and Indian reservations for more than twenty years. *See*
13 *id.* at 15, at "B." *See also, id.* at 15, "C" through "I." The Commission has, at the least, concurrent
14 jurisdiction over the issues involved in this case. *Qwest Corp. v. Kelly*, 59 P.3d at 794-97 (in addition
15 to this executive and legislative authority, the Commission has the judicial jurisdiction to hear grievances
16 and consumer complaints).

17 **D. The BIA's Contract Rights Against MEC Are Continuing**

18 MEC asserts that the Commission should construe the Contract and find that "there is no contract
19 between the parties as a matter of law" because the BIA failed to exercise its option to renew.⁶ MEC
20 Motion and Answer at 25. MEC also asserts that "BIA has admitted that the Contract expired in 1992
21 . . . " Both of MEC's assertions are erroneous.

22 First, the Contract, *see the Complaint at Ex. 1, Addendum 1, at p. 7*, provides that "Mohave
23 consents to the Government's right **and** option to renew this Contract for two (2) additional ten (10) year
24

25
26 ⁶ MEC cannot, on the one hand, argue that the Commission has no jurisdiction because this is
27 allegedly a contract dispute and then, on the other hand, ask the Commission to interpret the Contract
28 and find that it is no longer enforceable because the BIA failed to timely exercise its option to renew.

1 periods" (emphasis added). The plain wording of that portion of the Contract shows that the BIA
2 bargained for and retained two separate benefits: (1) a right to renew and (2) an option to renew. And,
3 the Contract does not, *see id.*, contain any time by which *either* the right to renew or the option to renew
4 was required to be exercised. MEC's contention that the BIA failed to timely exercise its option to
5 renew is therefore unfounded.

6 The Contract contains provisions for the BIA to reimburse MEC for its costs to construct the
7 Power Line. This reimbursement was to occur over the course of the first ten year period and at least
8 one option period. *See id.* at Addendum 1, pp. 6 – 7, at "Facilities Charges," and at p. 7, 1st para. MEC
9 admits that the BIA paid MEC the total amount of MEC's construction costs in 1991. Clearly, the
10 Contract's payment provisions required modification to credit BIA on a monthly basis for its pre-
11 payment of the Facilities Charge. On April 19, 1993, the BIA attempted to reach an agreement with
12 MEC on this required modification. *See* the Complaint at Ex. 4. MEC has not presented any evidence
13 to show that it cooperated with the BIA to make this conforming change to the payment provisions of
14 the Contract. Despite the fact that the BIA pre-paid the remaining amount owed for MEC's construction
15 costs (the Contract provided they were to be paid on a monthly basis over at the least twenty years),
16 MEC continued to bill the BIA the unchanged Facilities Charges until January 1995. *See* the Complaint
17 at 9, para. 18. It was not until its letter of June 15, 1995, that MEC informed BIA that MEC contended
18 that the Contract had expired in 1992. *See* the MEC Statement of Facts at 3, para. 12. MEC could not
19 operate for several years as if the Contract was effective and had been extended and then, when it suits
20 its purposes, contend the Contract had never been extended. In 2002, the BIA exercised its option for
21 the second ten year option. *See* the Complaint, Ex. 10.

22 MEC contends, *see* Motion and Answer at 26 – 27, that this case is controlled by *Anderson v.*
23 *Blake*, 205 Ariz. 236, 69 P.3d.7 (2003). MEC is incorrect as *Anderson* involved an option to purchase
24 leased property and provided that "the option granted hereby shall terminate if not exercised in writing
25 before October 1, 1999." 69 P.3d at 10. The Contract here is not an option to purchase leased property,
26 and it does not contain a date by which the BIA was required to exercise its option. Moreover, *Anderson*
27 did not involve a situation, such as in the instant case, where one party (the BIA) possessed a right to
28

1 renew and an option to renew the Contract without any limitation on the date by which that party must
2 renew or exercise its option.

3 The more appropriate principles applicable to this case are that set out in the Restatement of the
4 Law, Second, Contracts:

5 § 41 Lapse of Time

6 (1) An offeree's power of acceptance is terminated at the time specified in the offer, or, if no
time is specified, at the end of a reasonable time.

7 (2) What is a reasonable time is a question of fact, depending on all the circumstances existing
when the offer and attempted acceptance are made.

8 (3) Unless otherwise indicated by the language or the circumstances, and subject to the rule
9 stated in § 49, an offer sent by mail is seasonably accepted if an acceptance is mailed at any time before
midnight on the day on which the offer is received.

10 COMMENTS & ILLUSTRATIONS: Comment:

11 * * *

12 b. Reasonable time. In the absence of a contrary indication, just as acceptance may be made
in any manner and by any medium which is reasonable in the circumstances (§ 30), so it may be
13 made at any time which is reasonable in the circumstances. The circumstances to be considered
have a wide range: they include the nature of the proposed contract, the purposes of the parties, the
14 course of dealing between them, and any relevant usages of trade. In general, the question is what
time would be thought satisfactory to the offer or by a reasonable man in the position of the offeree;
but circumstances not known to the offeree may be relevant to show that the time actually taken by
15 the offeree was satisfactory to the offeror. *See* Illustration 6 to § 23.

16 *And see id.* at “§ 205 Duty of Good Faith and Fair Dealing” which states:

17 Every contract imposes upon each party a duty of good faith and fair dealing in its
18 performance and its enforcement.

19 COMMENTS & ILLUSTRATIONS: Comment:

20 * * *

21 d. Good faith performance. Subterfuges and evasions violate the obligation of good faith in
performance even though the actor believes his conduct to be justified. But the obligation goes
22 further: bad faith may be overt or may consist of inaction, and fair dealing may require more than
honesty. *A complete catalogue of types of bad faith is impossible, but the following types are among*
23 *those which have been recognized in judicial decisions: evasion of the spirit of the bargain, lack of*
diligence and slacking off, willful rendering of imperfect performance, abuse of a power to specify
24 *terms, and interference with or failure to cooperate in the other party's performance.* (Emphasis
added).

25 In the case at hand, MEC gladly accepted pre-payment of its construction costs. Yet despite the
26 fact that BIA pre-paid the MEC's construction costs in 1991 prior to end of the first ten year period,
27 MEC continued to bill and collect from BIA payments as if the pre-payment had not been made.

1 Complaint at Ex. 5. As noted above, the Contract did not contain a time within which either the right
2 to renew or the option to renew was to be invoked or exercised. Within 13 months of the end of the first
3 10 year period of the Contract, BIA informed MEC that the Contract required modification in order for
4 BIA to exercise its option. *Id.* at Ex. 4. MEC stonewalled the BIA's efforts to appropriately modify the
5 Contract to take into account the changed circumstances, so it cannot now complain the Contract
6 expired. The BIA submits that, under the circumstances, the BIA notice was within a reasonable time.
7 *Accord*, Restatement of the Law, Second, Contracts, §41 Lapse of Time, *supra*.

8 Even after the BIA fully reimbursed MEC's construction costs, MEC continued to bill and collect
9 from BIA payments as if the pre-payment had not been made. Complaint at Ex. 5. The BIA submits
10 that MEC did not perform its contractual duty of good faith, *see* Restatement of the Law, Second,
11 Contracts, "§ 205 Duty of Good Faith and Fair Dealing," in working with the BIA to modify the Contract
12 payment provision and MEC's billings and collections as a result of the pre-payment of MEC's
13 construction costs, and thus BIA is excused from not being able to reach an agreement with MEC in
14 order to be able to exercise either its right to renew or its option to renew the Contract. MEC's
15 unwillingness to cooperate with the BIA in 1993, and thereafter, in order that BIA's right to renew or
16 its option to renew could be completed in a reasonable time and manner is further evidenced by MEC's
17 contention that despite the BIA's prepayment,

18 [n]othing in the Contract provided the BIA's obligation to pay the Facility Charge would cease
19 or be reduced after the initial ten-year term of the Contract or after the costs of the Transmission
20 Line had been recouped. So long as the Contract remained in effect, the full amount of the
21 Facility Charge was payable to Mohave.

22 MEC Motion and Answer at 8, lines 1 – 4. MEC's refusal to cooperate in modifying the contract to
23 reflect the BIA's pre-payment of certain costs; MEC's actions in making the BIA pay twice the pre-paid
24 costs; MEC's refusal to give BIA an accounting (*see* the Complaint at Ex. 9); and MEC's assertion now
25 that the Contract permitted MEC to take such actions is evidence of MEC's bad faith within the scope
26 of the Restatement of Contracts, Second, § 205 Duty of Good Faith and Fair Dealing, cmt. d.
27
28

1 **E. MEC Has A Duty To The Public To Continue To Provide Service To**
2 **The BIA And To The Indian Reservations**

3 MEC contends that it has no obligation to continue to provide service to the Indian Reservations.
4 See Motion and Answer at 32 – 36 and *id.* at 34, lines 11 – 12 (“Mohave clearly has no continuing duty
5 to serve the “public” to provide electric to the Tribal lands”). Mohave is mistaken in this argument.
6 MEC’s implementation of the 1982 Contract, *see id.*, triggered MEC’s legal obligation to serve portions
7 of the Havasupai and Hualapai Indian Reservations. See A.R.S. § 40-281(B) and A.R.S. § 40-201.22.
8 The area traversed by MEC’s Power Line became MEC’s service territory. See A.R.S. § 40-201.22:

9 22. "Service territory" means the geographic area in which a public power entity or public
10 service corporation owns, operates, controls or maintains electric distribution facilities
11 or natural gas distribution facilities and *that additional area in which the public power*
12 *entity or public service corporation has agreed to extend electric distribution facilities*
13 *or natural gas distribution facilities*, whether established by a certificate of convenience
14 and necessity, by official action by a public power entity or *by contract or agreement*.
15 (Emphasis added).

16 A certification by the Commission of the subject area as MEC’s service territory was unnecessary to
17 make the territory in MEC has provided service to the BIA and others as MEC accepted the area in
18 question as its service territory. See A.R.S. 40-201.22 and A.R.S. § 40-281(B) (utility need not “secure
19 a certificate or an extension ... for an extension into territory either within or without a city, county or
20 town, contiguous to its . . . plant or system...”)

21 **F. Commission Approval Is Necessary For MEC To Abandon Its Power**
22 **Line**

23 The Havasupai Tribe and the Hualapai Tribe passed Tribal resolutions giving MEC easements
24 for rights-of-way across their lands for the MEC’s Power Line in order to have access to power and
25 electrical services from MEC. See the Complaint at Ex. 2, pp. 10 – 12. Mohave admits that the BIA
26 granted MEC easements across the Havasupai and Hualapai Indian Reservations for MEC’s electrical
27 power line. Compare the Complaint at 7, para. 15, with the MEC Motion And Answer at 41, para. 13.
28 See also, the MEC Motion and Answer at 16 at lines 6 – 7 (“The Tribes granted easements for use of
 these rights-of-way to Mohave for a 30 year period”). MEC further admits that it did not obtain an order
 from the Commission prior to attempting to abandon its electrical power line. See MEC Motion and

1 Answer at 36, lines 16 – 17 (“Mohave admits that it obtained no order from the Commission prior to
2 disposing or abandoning the Transmission Line”). But, MEC claims it was not required to obtain
3 Commission’s permission to quit claim the Power Line once it determined that the Line was not
4 necessary or useful to meet its obligations to the public. *Id.* at 36, lines 19 – 21. MEC’s claim is flawed
5 and erroneous.

6 The Arizona legislature has prohibited electric utilities from disposing of any of their lines or
7 systems that are necessary or useful in the performance of their duties to the public without first
8 obtaining permission from the Commission. A.R.S. § 40-285(A). Likewise, this Commission’s
9 regulations prohibit a utility from abandoning service without prior Commission approval. A.A.C. 14-2-
10 202(B). Before abandoning service to its customers, the utility must first apply to the Commission and
11 include in its application detailed information concerning the past, present and future services. *Id.*

12 MEC claims it determined the Power Line was not necessary or useful to perform its duties to
13 the public. Such a self-serving claim is difficult to accept or fathom. The Power Line was providing
14 electricity to the BIA and to approximately thirteen other MEC customers. The Line was (and is)
15 necessary and useful to serve MEC customers. The Commission has the jurisdiction and authority to
16 determine whether property of a public service corporation is necessary and useful to the public. *Babe*
17 *Investments v. Arizona Corporation Commission*, 189 Ariz. 147, 939 P.2d 425, 429 (App. 1997). A.R.S.
18 40-285 “permits the “necessary or useful” issue to be resolved in proceedings brought by an interested
19 party. *Id.*

20 The Complaint in this case alleges that prior and subsequent to MEC’s construction of its Power
21 Line no commercial or cooperative electrical provider ever constructed or maintained electrical
22 distribution facilities through which electricity was or can be provided to Long Mesa or the Havasupai
23 Village. The BIA submits that it is entitled to a hearing on this issue.

24 **G. The BIA’s Trust Responsibility**

25 Throughout its Motion and Answer, MEC makes the unsupported allegation that this case is
26 about the BIA’s failure of its trust responsibilities to the Tribes. *See, e.g.*, Motion and Answer. at p.1,
27 line 21 – p. 2, line 1 (“This case is about the BIA failure to fulfill those trust responsibilities and its
28

1 fiduciary duties to the Hualapai and Havasupai Tribes"). As noted above, MEC is wrong as this case
2 is about MEC's failures to meet its statutory and regulatory obligations. Additionally, the BIA does not
3 have the "trust" responsibilities MEC alleges.


4 An alleged trust responsibility of the United States must be established in a substantive source
5 of law that establishes specific fiduciary or other duties. Although there exists a general trust
6 relationship between the United States and the Indians, that relationship alone is insufficient to support
7 the existence of an obligation on the United States. *See United States v. Navajo Nation*, 537 U.S. 488,
8 506 (2003). In the instant case, MEC has not identified any statute or regulation that mandates the
9 United States to furnish electricity to the Tribes in this instance. Accordingly, MEC's claim that the BIA
10 failed to perform its trust and fiduciary responsibilities is without merit and should be seen for what it
11 is—MEC's attempt to shift blame and to avoid its statutory and regulatory responsibilities.

12 IV. CONCLUSION

13 Based on the foregoing, the BIA respectfully submits that MEC's motion to dismiss is not
14 supported by the facts or the law, and requests the Commission to deny MEC's motion to dismiss.

15 Respectfully submitted this 21 day of October, 2005.

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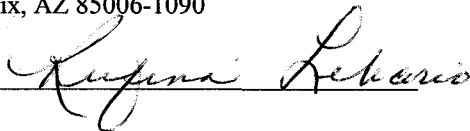
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